

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 4

Docket No. DC-1221-10-0164-W-1

**Ronald J. Herman,
Appellant,**

v.

**Department of Justice,
Agency.**

January 7, 2011

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania, for the appellant.

Gail Elkins, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision dismissing his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-13 Human Resources Examiner with the Bureau of Prisons (BOP), filed an IRA appeal alleging that the agency reassigned him,

issued him letters of counseling, made log entries, and gave him a performance appraisal containing derogatory information in reprisal for his disclosures protected under the Whistleblower Protection Act (WPA). Initial Appeal File (IAF), Tab 1. The appellant alleged that he disclosed the following: That Juan Castillo, Deputy Assistant Director, Human Resources Management Division, had violated the Privacy Act by informing the appellant's second-level supervisor that the appellant's December 2007 program review of administrative operations at BOP's Consolidated Employee Services Center in Grand Prairie, Texas, may have been unduly harsh and might have been motivated by the fact that the appellant's daughter, who previously worked at BOP, had been suspended for misconduct; that the appellant's immediate supervisor abused her authority by issuing and then retracting a letter of counseling to the appellant, making log entries derogatory of him, and detailing him to another position while indicating that if he applied for a position elsewhere she would make this all go away; and that during program reviews the appellant's first and second level supervisors arrived late, were not interacting with the team, made sarcastic and inappropriate comments in front of the team, and delegated to an inmate orderly the handling of sensitive documents. IAF, Tab 5.

¶3 The administrative judge denied the appellant's request for a hearing based on the administrative judge's finding that the appellant failed to make a nonfrivolous allegation of Board jurisdiction. IAF, Tab 14 (Initial Decision) at 1. Based on the written record, the administrative judge found that the appellant exhausted his remedies before the Office of Special Counsel (OSC) and, based on the knowledge/timing test, made a nonfrivolous allegation that his alleged protected disclosures were a contributing factor to the agency's actions. Initial Decision at 6. The administrative judge, however, found that the appellant failed to make a nonfrivolous allegation that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidenced a violation of

law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Initial Decision at 5-9.

¶4 The administrative judge found that the appellant did not make a nonfrivolous allegation that Castillo violated the Privacy Act by informing management officials that the appellant's daughter had been suspended. Initial Decision at 6. The administrative judge found that the Privacy Act permits disclosure of personal information maintained in agency records to any agency employee who requires the information for official purposes. *Id.* He also found that the appellant did not allege that Castillo had disclosed the information about the appellant's daughter for other than official purposes, and that nothing in the record allowed a disinterested observer to reasonably conclude that Castillo had violated the Privacy Act or any other law, rule, or regulation. Initial Decision at 6-7. The administrative judge found that the appellant disagreed with his supervisor's issuing the appellant a letter of counseling and informally detailing him to another position but failed to make a nonfrivolous allegation that such actions constituted an abuse of authority. Initial Decision at 7. Finally, the administrative judge found that the appellant failed to make a nonfrivolous allegation that the actions of his first and second level supervisors during program reviews constituted an abuse of authority or gross mismanagement or gross waste of funds. Initial Decision at 8-9. The administrative judge dismissed the appeal for lack of jurisdiction.

¶5 The appellant has filed a petition for review. Petition for Review File, Tab 3. The agency has not responded to the petition.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The Board has

jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001).

¶7 To satisfy the exhaustion requirement of [5 U.S.C. § 1214](#)(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, [981 F.2d 521](#), 526 (Fed. Cir. 1992). A protected disclosure under [5 U.S.C. § 2302](#)(b)(8) is any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Drake v. Agency for International Development*, [543 F.3d 1377](#), 1380 (Fed. Cir. 2008). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in [5 U.S.C. § 2302](#)(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Id.* at 1382. A very broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in duties. *See* 5 U.S.C. § 2302(a)(2)(A)(xi); *Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 912 (Fed. Cir. 2008).

¶8 In an IRA appeal, the jurisdictional threshold is met if the employee presents nonfrivolous allegations that he made a protected disclosure that was a contributing factor to a personnel action taken or proposed. *Johnston*, [518 F.3d at 909](#). Whether the appellant's allegations can be proven on the merits generally is not part of the jurisdictional inquiry. *Id.* at 911. The determination of whether

an appellant has presented nonfrivolous allegations is determined on the written record; if jurisdiction exists, the Board then conducts a hearing on the merits. *Kahn v. Department of Justice*, [528 F.3d 1336](#), 1341 (Fed. Cir. 2008). In assessing whether the appellant has made nonfrivolous allegations, the administrative judge may consider the agency's documentary evidence; however, to the extent the agency's evidence constitutes mere factual contradiction of the appellant's allegations, the administrative judge may not weigh evidence and resolve conflicting assertions, and the agency's evidence may not be dispositive. *Weed v. Social Security Administration*, [113 M.S.P.R. 221](#), ¶ 19 (2010). Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Drake v. Agency for International Development*, [103 M.S.P.R. 524](#), ¶ 11 (2006); *see also Swanson v. General Services Administration*, [110 M.S.P.R. 278](#), ¶ 11 (2008) (any doubt as to whether the appellant made a nonfrivolous allegation of wrongdoing should be resolved in favor of finding jurisdiction).

¶9 Here, there is no dispute regarding the administrative judge's conclusions that the appellant exhausted his remedy before OSC, made a nonfrivolous allegation that he was the subject of covered personnel actions, and, using the knowledge/timing test, established that his disclosures were a contributing factor to the agency's actions. *See* [5 U.S.C. § 1221](#)(e)(1)(A), (B). In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. [5 U.S.C. § 1221](#)(e)(1); *Wadhwa v. Department of Veterans Affairs*, [110 M.S.P.R. 615](#), ¶ 12 (2009); *Carey v. Department of Veterans Affairs*, [93 M.S.P.R. 676](#), ¶ 11 (2003). Once an appellant has made a nonfrivolous allegation that the

knowledge/timing test has been met, the administrative judge must find that the appellant's whistleblowing was a contributing factor in the personnel action. *Wadhwa*, [110 M.S.P.R. 615](#), ¶ 12; *Wood v. Department of Defense*, [100 M.S.P.R. 133](#), ¶ 13 (2005). Thus, the administrative judge did not erroneously reach the merits of the appellant's IRA appeal when he found that the appellant established that his disclosures were a contributing factor to the agency's action. Further, we find that these conclusions are supported by the written record. Therefore, the only issue before the Board is whether the appellant presented a nonfrivolous allegation that he made a protected disclosure.

¶10 As noted, the appellant alleged that Castillo violated the Privacy Act by informing the appellant's second-level supervisor that the appellant's daughter, who previously worked at BOP, had been suspended for misconduct. The administrative judge found that, under [5 U.S.C. § 552a\(b\)](#), the appellant's allegation did not arise to a nonfrivolous allegation of a violation of law because the Privacy Act permits personal information maintained in the agency's records to be disclosed to any agency employee who requires the information for official purposes. Initial Decision at 5. However, there is no record evidence that the appellant's duties required him to be familiar with the intricacies of the Privacy Act. His duties included conducting management evaluations of the personnel programs in the Central Office's Human Resources Management Division. IAF, Tab 8. Further, it is unclear whether Castillo's revelation to the agency's managers was permitted under the Privacy Act because Castillo's belief that the appellant's December 2007 program review of administrative operations at BOP's Consolidated Employee Services Center in Grand Prairie, Texas, may have been unduly harsh did not require that he posit a motivation for the appellant's unduly harsh review and did not require that Castillo reveal that the appellant's daughter had been disciplined. We conclude that the appellant, who is not a lawyer, nonfrivolously alleged he reasonably believed that the agency violated the

Privacy Act. Thus, the administrative judge erred in finding that the appellant failed to make a nonfrivolous allegation that he disclosed a violation of law.

¶11 The appellant also disclosed that his supervisor issued and then retracted a letter of counseling to the appellant, made log entries derogatory of him, and detailed him to another position while indicating that, if he applied for a position elsewhere, she would make this all go away. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons. There is no de minimis standard for abuse of authority as a basis of a protected disclosure under the WPA. Harassment or intimidation of other employees may constitute an abuse of authority. A supervisor's use of his influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he disagrees constitutes abuse of authority. *Pedeleose v. Department of Defense*, [107 M.S.P.R. 191](#), ¶ 37 (2007); see *Jessup v. Department of Homeland Security*, [107 M.S.P.R. 1](#), ¶ 8 (2007). We find that the appellant made a nonfrivolous allegation that he disclosed an abuse of authority. A disinterested observer could reasonably conclude that the supervisor's alleged action, threatening the appellant's career by indicating that the derogatory personnel action would go away if the appellant would find another career path, constituted an abuse of authority.

¶12 Further, the appellant disclosed that, during program reviews, the appellant's first and second level supervisors arrived late, were not interacting with the team, made sarcastic and inappropriate comments in front of the team, and delegated to an inmate orderly the handling of sensitive documents. The administrative judge erred in finding that the appellant's disclosures were within the normal performance of his job duties. The appellant's duties as an examiner included reviewing the institutional operations to ensure that there was not waste, fraud, or abuse; they did not include disclosing the illegal abuse of authority by

his supervisors. *See Kahn*, [528 F.3d 1336](#). We find that the appellant made a nonfrivolous allegation of abuse of authority by disclosing that his supervisors harassed or intimidated the review team by making sarcastic remarks in front of them.

¶13 We note that discussions and disagreements over job related duties is a normal part of most positions, and not every complaint about the employee's disagreement with the supervisor's conduct is protected by the WPA. *Huffman v. Office of Personnel Management*, [263 F.3d 1341](#), 1350 (Fed. Cir. 2001); *Lachance v. White*, [174 F.3d 1378](#), 1381 (Fed. Cir. 1999) (the WPA is not a weapon in arguments over policy or a shield for insubordinate conduct). However, in this case, the matter appears beyond a simple dispute between an employee and a supervisor, at least for purposes of assessing whether the appellant has presented a nonfrivolous allegation establishing jurisdiction over his IRA appeal. *See generally Swanson*, [110 M.S.P.R. 278](#), ¶ 11. Thus, there remain issues of fact that require further development on remand.

ORDER

¶14 Accordingly, we find that the appellant met his burden to show that the Board has jurisdiction over this IRA appeal. We remand the appeal to the regional office for further adjudication, including a hearing, consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.